

BEFORE THE ADDITIONAL FACILITY OF THE  
**INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES (ICSID)**

**BETWEEN:**

**MERCER INTERNATIONAL INC.,**

**Claimant/Investor**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent/Party**

**ICSID CASE NO. ARB(AF)/12/(3)**

---

**GOVERNMENT OF CANADA**  
**RESPONSE TO CLAIMANT'S 25 JUNE 2018 OBSERVATIONS**

**16 July 2018**

---

Trade Law Bureau  
Government of Canada  
Lester B. Pearson Building  
125 Sussex Drive  
Ottawa, Ontario  
K1A 0G2  
CANADA

## **I. INTRODUCTION**

1. In its 25 June 2018 Observations (“Observations”), the Claimant continues to assert that the Tribunal “omitted to decide” its claim that BCUC Order G-48-09 violates NAFTA Articles 1102 and 1103 (“G-48-09 Claim”).<sup>1</sup> For the reasons set forth below, in Canada’s 4 June 2018 reply (“Reply”), and the Tribunal’s unambiguous statements in its Award that it “has decided”<sup>2</sup> and, in two separate places, “dismisses”<sup>3</sup> the G-48-09 Claim, the Claimant’s request for a supplementary decision (“Request”) pursuant to Article 57 of the ICSID (AF) Rules (“Article 57”) is without merit and must be rejected.

## **II. THE CLAIMANT DOES NOT CONTEST THAT ARTICLE 57 IS LIMITED IN SCOPE**

2. Pursuant to Article 52(1)(i) of the ICSID (AF) Rules, the Tribunal is required in its Award to render a decision “on every question submitted to it”. The right to a supplementary decision under Article 57 applies only if the Tribunal “fail[ed] to discharge its duty” under Article 52(1)(i).<sup>4</sup> It is not a mechanism for the Tribunal to reconsider its decision or reasoning.<sup>5</sup> Nor does it exist to allow parties to reopen arbitrations that do not go their way, or to rehash arguments that were addressed and decided by the tribunal. This has been confirmed numerous times:

- *LG&E v. Argentina*: “[T]he supplementation process is not a mechanism by which parties can continue proceeding on the merits or seek a remedy that calls into question the validity of the Tribunal’s decision.”<sup>6</sup>

---

<sup>1</sup> Claimant’s Observations, ¶ 10.

<sup>2</sup> Award, ¶ 7.63.

<sup>3</sup> *Ibid*, ¶¶ 8.5, 10.5.

<sup>4</sup> Christoph H. Schreuer, *ICSID Convention: A Commentary*, (Cambridge University Press, 2001), p. 849.

<sup>5</sup> Canada’s Reply, ¶¶ 2-4.

<sup>6</sup> *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 (Decision on Claimants’ Request for Supplementary Decision, 8 July 2008), ¶ 16. This case was decided under Article 49(2) of the ICSID Convention, which has nearly identical language to Article 57 of the ICSID (AF) Rules. Article 49(2) of the ICSID Convention provides in relevant part: “The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award...”.

- *ADM v. Mexico*: “Article 57 does not empower the Arbitral Tribunal to make a new decision, or to modify its existing decision, or even to supplement the reasoning of its existing decision.”<sup>7</sup>
- *Loewen v. United States*: “[I]t is not open to the Tribunal to reconsider [its reasoning]” or its decision to dismiss the claim before it.<sup>8</sup>
- *Vivendi v. Argentina*: “[A]ny supplementary decision or rectification as may result, in no way consists of a means of appealing or otherwise revising the merits of the decision subject to supplementation or rectification.”<sup>9</sup>

3. The Claimant does not contest this jurisprudence. To the contrary, it quotes with approval the reasoning in *ADM v. Mexico*<sup>10</sup> and thus implicitly agrees that the remedy under Article 57 is limited in scope.

### **III. THE TRIBUNAL DID NOT OMIT TO DECIDE THE QUESTION IDENTIFIED BY THE CLAIMANT**

4. The Claimant asserts that the Tribunal “fail[ed] to decide the merits of Mercer’s G-48-09 discrimination claim”,<sup>11</sup> but does not disagree that the Award “decided”<sup>12</sup> and “dismissed”<sup>13</sup> the Claimant’s G-48-09 Claim under NAFTA Articles 1102 and 1103. While the Claimant suggests that the Tribunal did “not address Mercer’s liability claim on the merits”, its real complaint is

---

<sup>7</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05 (Decision on the Requests for Correction, Supplementary Decision and Interpretation (redacted version), 10 July 2008), ¶ 12.

<sup>8</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Decision on Respondent’s Request for a Supplementary Decision, September 6, 2004), ¶ 21.

<sup>9</sup> *Compania de Aguas Del Aconquija S.A. and Vivendi Universal (formerly Compagnie Generale des eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3 (Decision of the *Ad Hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning annulment of the Award, May 28, 2003), ¶ 11. This case was decided under Article 49(2) of the ICSID Convention, which has nearly identical language to Article 57 of the ICSID (AF) Rules.

<sup>10</sup> Claimant’s Request for Supplementary Decision, 20 April 2018 (Claimant’s Request), fn. 2.

<sup>11</sup> Claimant’s Observations, ¶ 10. The Claimant explained its G-48-09 Claim during the proceedings, *see* Hearing Transcript, Volume 1, pp. 40:17-41:11; Claimant’s Reply Memorial, ¶ 33; First Expert Report of Brent Kazcmerek (31 March 2014), ¶ 79; and Second Expert Report of Brent Kazcmerek (16 December 2014), ¶ 3.

<sup>12</sup> Award, ¶ 7.63.

<sup>13</sup> *Ibid*, ¶¶ 8.5, 10.5.

---

that it believes the Tribunal incorrectly dismissed the claim. Indeed, it states that the Tribunal “dismissed the [Order G-48-09] liability claim *based on its belief* that Mercer had made no separate claim for damages.”<sup>14</sup> The Claimant thus argues that the Tribunal misinterpreted its submissions with respect to its damages claim relating to Order G-48-09, and seeks to appeal its conclusion; however, Article 57 does not permit the Tribunal to reconsider its decision or supplement its reasoning.<sup>15</sup>

5. Moreover, the Claimant’s argument that the Tribunal’s repeated dismissals of the G-48-09 Claim should be ignored because the dismissals “are summary paragraphs that tie to the Tribunal’s dismissal of the Claim in Paragraph 7.40”<sup>16</sup> is conjecture. None of the Tribunal’s statements refer expressly to any paragraph, but were each made towards the end of the Award in the context of all of the findings that had been made. As the tribunal in the *Loewen* case determined, the entirety of the award must be considered to assess whether the question posed by the Claimant’s Request has been answered.<sup>17</sup> In that case, even a claim that was not expressly mentioned in the Tribunal’s disposition was deemed to have been considered and decided.<sup>18</sup> Here, the Claimant attempts to isolate the Tribunal’s reasoning under Articles 1102 and 1103 to a single paragraph, while ignoring the Tribunal’s broader analysis. This broader analysis disagreed with the factual premise underlying the Claimant’s G-48-09 Claim – which critically defined the “treatment” to which the Claimant was subject<sup>19</sup> – disagreed that any of the comparators put

---

<sup>14</sup> Claimant’s Observations, ¶ 7 (emphasis added). *See also* Claimant’s Observations, ¶ 2 (“The Tribunal thus declined to address Mercer’s liability claim on the merits, because it believed Mercer sought no damages with a nexus to that liability claim.”)

<sup>15</sup> Canada’s Reply, ¶¶ 2-4.

<sup>16</sup> Claimant’s Observations, ¶ 7.

<sup>17</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 ([Decision on Respondent’s Request for a Supplementary Decision](#), September 6, 2004), ¶¶ 19-20.

<sup>18</sup> *See* Canada’s Reply, ¶ 4; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 ([Decision on Respondent’s Request for a Supplementary Decision](#), September 6, 2004), ¶¶ 19-20.

<sup>19</sup> As Canada explained in its Reply (Canada’s Reply, ¶¶ 9-10), the Tribunal addressed directly in its Award the veracity of the Claimant’s asserted facts underlying its G-48-09 Claim (Award, ¶ 7.79). In its Observations, the Claimant argues that the Tribunal’s factual determination is not relevant to its Request because the determination was made in the context of the Claimant’s claim under NAFTA Article 1105 and not Articles 1102 and 1103 (Claimant’s Observations, ¶ 8). However, *where* the Tribunal made its determination of the facts makes no

forward by the Claimant are “in like circumstances” (a point raised by Canada in its Reply,<sup>20</sup> to which the Claimant provided no response in its Observations), and determined that the BCUC should be accorded deference.<sup>21</sup>

6. In any event, it is incorrect for the Claimant to suggest that the Tribunal misinterpreted its submissions. With respect to its G-48-09 Claim, the Claimant made its position abundantly clear: “Mercer does not claim additional or separate damages resulting from Order G-48-09’s net-of-load restriction.”<sup>22</sup> The Claimant advanced this same position in its closing arguments at the Hearing:

**Mr. Shor:** Now, this is a little bit of a complicated point, but I think this is one point of common agreement between us and Canada. There are no separate damages stemming from the G-48-09 discrimination that are distinct from the damages that flow from the discriminatory setting of Celgar's GBL.

**President Veeder:** To pick up the point by Professor Douglas, so that point it doesn’t matter whether we deal with the Measures separately or collectively.

**Mr. Shor:** That’s correct. I think we deal with them collectively.<sup>23</sup>

7. The Claimant’s attempt in its Request and Observations to retract its position by pointing to other statements that it made at the Hearing and in its Post-Hearing Submission<sup>24</sup> must be

---

difference. In fact, it was the Claimant who argued that Article 1105 includes a general prohibition of “discrimination” against foreign investors, and in its pleadings relied entirely on the same factual arguments that it made in its claim under NAFTA Articles 1102 and 1103 to substantiate its claim under Article 1105 (*see e.g.*, Claimant’s Reply Memorial, ¶ 507: “Mercer covered the discrimination pillar of the minimum standard of treatment [under Articles 1102 and 1103] above.”). The discriminatory treatment alleged by the Claimant under Articles 1102 and 1103 relied on the premise that the BCUC “imposed a *more restrictive* net-of-load access standard on Celgar” than it imposed on other pulp mills (*see e.g.*, Claimant’s Reply Memorial, ¶ 222). The Tribunal’s factual determination in its Award that Celgar “acquired a right that no other mill had” – *i.e.*, that it had received much more favourable treatment – thus fully answers the Claimant’s argument under Articles 1102 and 1103.

<sup>20</sup> Canada’s Reply, ¶ 7.

<sup>21</sup> *Ibid*, ¶ 8. The Claimant also did not address this point in its Observations.

<sup>22</sup> Claimant’s Reply Memorial, ¶ 205.

<sup>23</sup> Hearing Transcript, Volume 8, pp. 2207:17-2208:6.

ignored; and the Claimant's suggestion that Canada must offer a response to the "contextual explanation" provided by the Claimant in its Request<sup>25</sup> only proves that the Claimant is seeking to re-engage on the merits. Regardless of whatever conflicting arguments the Claimant advanced during the course of the proceedings, it is obvious that the Tribunal relied on the Claimant's submissions to decide and dismiss the G-48-09 Claim.<sup>26</sup> Nowhere did the Tribunal "state[] it did not need to decide"<sup>27</sup> the G-48-09 Claim as the Claimant alleges. To the contrary, the Award states: "[T]he Tribunal has decided that that the Claimant's claims for 'discriminatory treatment' based upon NAFTA Articles 1102, 1103 and 1105(1) in relation to BCUC Order G-48-09 must be rejected."<sup>28</sup> Given that Article 57 applies only where a tribunal "omitted to decide" a question, the Claimant's Request is broader than what is permissible under Article 57.

#### **IV. CONCLUSION**

8. The Claimant's Request is beyond the scope of Article 57. For all of the reasons set out here and in Canada's Reply, the Request must be dismissed, and the Claimant should be ordered to bear Canada's costs.

---

<sup>24</sup> Claimant's Request, ¶¶ 6-10; Claimant's Observations, ¶. 4. The Claimant suggests that because of these statements none of the arguments it made during the proceedings can be construed as a "waiver" of its G-48-09 Claim (Claimant's Observations, para. 4). However, Canada has not suggested that the Claimant waived its G-48-09 Claim, which was decided and dismissed by the Tribunal in its Award.

<sup>25</sup> Claimant's Observations, ¶ 3.

<sup>26</sup> Canada's Reply, ¶ 12.

<sup>27</sup> Claimant's Observations, ¶ 6.

<sup>28</sup> Award, ¶ 7.63.

July 16, 2018

*Respectfully submitted  
on behalf of Canada,*



---

Adam Douglas  
Krista Zeman  
Michael Owen  
Andrew Mason

Department of Foreign Affairs and  
International Trade  
Trade Law Bureau  
125 Sussex Drive  
Ottawa, Ontario  
CANADA K1A 0G2